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ALEXANDER L. STEVAS,
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NO. 83-2029

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SAFE WATER FOUNDATION OF TEXAS, ET AL,
Appellants

v.

CITY OF HOUSTON,
Appellee

On Appeal From The Supreme Court Of Texas

APPELLEE CITY OF HOUSTON'S MOTION TO DISMISS

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APPELLEE CITY OF HOUSTON'S MOTION TO DISMISS

COMES NOW the Appellee City of Houston to move that this appeal be dismissed on the ground that no substantial federal question is presented and that this case does not warrant further briefing and oral argument.

STATEMENT OF THE CASE

This is a case involving a challenge to the exercise of a municipality's police power to promote the health,

welfare and safety of its citizenry. Appellants' recitation of the procedural history of this litigation is correct except that they continue their shrill but erroneous assertion that they obtained a fact finding by the trial court that fluoridation is harmful. (Jurisdictional Statement at 4, 6, 7, 13.) Specifically, they declare: "Judge Farris also found as a fact for the record, on the basis of a preponderance of the evidence adduced at trial, that—" and then they offer this excerpt from Finding of Fact No. 5:

> "artificial fluoridation of public water supplies, such as is contemplated by City Ordinance No. 80-2530, may cause or may contribute to the cause of cancer, genetic damage, intolerant reactions, and chronic toxicity, including dental mottling, in man; that the said artificial fluoridation may aggravate malnutrition and existing illnesses in man; and that the value of said artificial fluoridation is in some doubt as to the reduction of tooth decay in man."
> (Jurisdictional Statement at 6.)

Appellants apparently have convinced themselves, based upon this selective and misleading excerpt, that they really prevailed but that the court neglected to enjoin this harmful practice, and that this omission was somehow overlooked by the Texas Court of Appeals and the Supreme Court of Texas. In actuality, Appellants have consistently ignored the beginning language of Finding of Fact No. 5 which states:

> "The considerable amount of evidence introduced, heard and considered by this Court at the trial of this cause on January 13, 14, 15, 18, 19, 20, 21, 22, 25, 26 and 27, 1982, shows that. . . ."

When read in its entirety, Finding of Fact No. 5 is more a comment on the nature and content of the Appellants' evidentiary presentation at trial than a basis for stating Appellants were "successful in securing formal findings of fact of [sic] the record, based on a preponderance of concrete evidence in open court, that artificial fluoridation is harmful or dangerous." (Jurisdictional Statement at 13.) The City of Houston's more limited reading of Finding of Fact No. 5 is supported by the other Findings of Fact, particularly Nos. 4, 8, 9 and 10, and Conclusions of Law Nos. 3 and 6. (Jurisdictional Statement at 29a-32a.) Nowhere in the record is there a basis for concluding that the Appellants were entitled to an injunction as a matter of law. Clearly that was the opinion of the three Courts below that reviewed this matter.

SUMMARY OF ARGUMENT

This appeal should be dismissed for want of a substantial federal question for two reasons. First, Appellants have not shown the invasion of any fundamental rights secured by the United States Constitution. Therefore, this litigation falls under the general standard of review under the Fourteenth Amendment of challenges to the exercise of a municipality's police power. The record below shows no error in the judgments of the lower courts reviewing this challenge. Second, the nature and scope of a municipality's police power is so inextricably tied to issues of state law as to make federal review inappropriate. Absent the invasion of some fundamental federal right, the standard of review in this case under the Fourteenth Amendment is one of a rational relationship between the police power measure and the public health. Throughout the

litigation of the case below, Appellants made a frontal assault on the authority of a municipality to fluoridate its water supply. Therefore, the real thrust of Appellants' claim turns on the police power of a municipality under Texas law and the scope of review in the Texas Courts of a legislative decision to exercise the police power. These are matters of state law and do not present a substantial federal question.

ARGUMENT

I. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN THE ABSENCE OF THE INVASION OF A FUNDAMENTAL CONSTITUTIONAL RIGHT.

The right asserted here by Appellants has undergone considerable change, although perhaps not rising to the level of a jurisdictional defect. Before the Texas Court of Appeals, they phrased their claim thus:

> "Appellants urge upon this Court that Appellants' rights of privacy and substantive due process guaranteed by the United States and Texas Constitutions have been violated. The right Appellants now assert, as clearly as it may be articulated, is the right to control the substances which they are in effect forced to consume which threaten their bodily integrity and health." (Brief of Appellant at 23-24.)

Except for changes in nomenclature, the identical phrasing was presented to the Supreme Court of Texas. (Application for Writ of Error at 16-17.) Now, before this Honorable Court, the Appellants attempt to modernize their claim and take up the mantle of environmental litigants, saying:

> "N.B., the question here raised is based, not on an abstract claim of privacy or freedom of choice in health matters, but rather on a judicial finding from considerable scientific evidence of the existence of grave environmental danger." (Jurisdictional Statement at 4.)

This is but another effort in search of some cognizable legal basis for defeating in the courts a legislative decision in favor of fluoridation. The results of some thirty years of litigation have been generally adverse to Appellants' position. The earlier history of fluoridation litigation was aptly summarized by one court:

> "Although no harmful results from fluoridation have been clearly proven and it has no effect upon the color, taste or odor of water and despite the health benefits that are clearly derived, proposals to fluoridate drinking water have encountered extraordinary opposition and antagonism. The generative forces of this hostility are not easily identified but have found expression in a variety of arguments. It is contended, variously, that there is a lack of statutory authority for the municipal action; that even if adequate statutory authority can be inferred, fluoridation is an abusive exercise of police power and as such is constitutionally offensive; that it prohibits the free exercise of religion by imposing medication upon those who would resist it; and that it otherwise constitutes a deprivation of personal liberties. The courts throughout the nation have been virtually unanimous in resisting these as well as other arguments, and in upholding fluoridation of drinking water as a valid public health measure whenever a challenge has been presented. [Extensive citations omitted.]
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> * * *

> "The unanimity of appellate state court holdings is matched only by the frequency and persistent regularity with which the United States Supreme Court has declined review." *Young v. Board of Health,* 61 N.J. 76, 293 A.2d 164, 165-166 (N.J. 1972).

In four cases the Supreme Court declined to grant review by certiorari on decisions of state courts upholding the constitutionality of fluoridation.[1] While the denial of certiorari is not of precedential value *per se,* in five other cases this Court dismissed the appeal for want of a substantial federal question.[2] Such an action by this Court is a decision on the merits, despite its summary nature, and therefore constitutes binding precedent for the lower courts. *Hicks v. Miranda,* 422 U.S. 332 (1975); *Tully v. Griffin, Inc.,* 429 U.S. 68 (1976). Thus, despite numerous opportunities to do so, this Court has never recognized any version of the fundamental right such as Appellants seek to establish. Therefore, it is not surprising, when presented with a direct constitutional challenge, that a Federal District Court observed:

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1. *Paduano v. City of New York,* 45 Misc. 2d 718, 257 N.Y.S. 2d 531, *affirmed,* 24 App. Div. 2d 437, 260 N.Y.S.2d 831 (1965), *affirmed,* 17 N.Y.S.2d 875, 271 N.Y.S.2d 305, 218 N.E.2d 339 (1966), *cert. denied,* 385 U.S. 1026 (1967); *Schuringa v. City of Chicago,* 30 Ill. 2d 504, 198 N.E.2d 326 (1964); *cert. denied,* 379 U.S. 964 (1965); *DeAryan v. Butler,* 119 Cal. App. 2d 674, 260 P.2d 98 (1953), *cert. denied,* 347 U.S. 1012 (1954); *Dowell v. City of Tulsa,* 273 P.2d 859, 43 A.L.R.2d 445 (Okla. 1954), *cert. denied,* 348 U.S. 912 (1955).

2. *Minnesota State Board of Health v. City of Brainerd,* 241 N.W.2d 624 (1976), *appeal dismissed,* 429 U.S. 803 (1976); *Canton v. Whitman,* 44 Ohio St. 2d 62, 337 N.E.2d 766 (1975), *appeal dismissed,* 425 U.S. 956 (1976); *Chapman v. City of Shreveport,* 225 La. 859, 74 So.2d 142 (1954), *appeal dismissed,* 348 U.S. 892 (1954); *Kraus v. City of Cleveland,* 163 Ohio St. 559, 127 N.E.2d 609 (1955), *appeal dismissed,* 351 U.S. 935 (1956); *Birnel v. Town of Fircrest,* 53 Wash. 2d 830, 335 P.2d 819 (1959), *appeal dismissed,* 361 U.S. 10 (1959).

> "Courts, both state and federal, have held with virtual unanimity that the fluoridation of public water systems does not violate the due process clause or constitutional rights incorporated by that clause of the Fourteenth Amendment to the United States Constitution." *Alkire v. Cashman,* 350 F.Supp. 360, 362 (S.D. Ohio 1972), *aff'd* 477 F.2d 598 (6th Cir. 1973), *cert. denied,* 414 U.S. 858 (1973).

Appellants further argue that the courts need not defer to legislative decision-making except in areas of economic regulation. (Jurisdictional Statement at 8.) This view is unsupported by the case law. This Honorable Court's refusal, as a matter of constitutional law, to review the wisdom of legislation is not confined merely to the area of economic regulation but also has included measures designed to protect or enhance public health or safety.[3] Clearly, the standard of review, in the absence of infringement upon a fundamental right, is not whether the legislative body was right or wrong in deciding to fluoridate but rather whether it was deciding a debatable issue concerning the exercise of the police power. This was the correct standard used by the Texas Courts, which

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3. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456 (1981) (Ban on retail sale of milk in nonreturnable containers); *Hodel v. Indiana,* 452 U.S. 314 (1981) (Congressional Act requiring reclamation of land subjected to surface mining); *Standard Oil Co. v. City of Marysville,* 279 U.S. 582 (1929) (Ordinance restricting storage of flammable liquids); *Lambert v. Yellowley,* 272 U.S. 581 (1926) (Congressional Act limiting physicians prescribing liquor); *Cusack v. City of Chicago,* 242 U.S. 526 (1917) (ordinance regulating construction and maintenance of billboards); *Price v. Illinois,* 238 U.S. 446 (1915) (State statute prohibiting sale of food preservatives containing boric acid); *Collins v. State of Texas,* 223 U.S. 288 (1912) (State statute governing medical practitioners); *Laurel Hill Cemetery v. City and County of San Francisco,* 216 U.S. 358 (1910) (Ordinance prohibiting burial of the dead within city and county limits); *Jacobson v. Massachusetts,* 197 U.S. 22 (1905) (State statute requiring smallpox vaccinations).

finds its parallel in the rational relationship test under the Fourteenth Amendment.

No court has expanded the fundamental rights of the personal privacy and liberty to encompass the Appellants' claims. While a right of privacy has been recognized in various contexts, this Court has never recognized an absolute right to bodily integrity. *Roe v. Wade,* 410 U.S. 113, 154 (1973); *Schmerber v. California,* 384 U.S. 757, 768 (1966); *Breithaupt v. Abram,* 352 U.S. 432, 439 (1957); *Jacobson v. Massachusetts,* 197 U.S. 22 (1905). Thus, the absence of a fundamental right is fatal to Appellants' claims of a substantial federal question.

II. A MUNICIPALITY'S AUTHORITY TO EXERCISE ITS POLICE POWERS AND THE SCOPE OF REVIEW IN THE COURTS IS ESSENTIALLY AN ISSUE OF STATE LAW.

The City of Houston recognizes that the existence of a federal constitutional issue may be separate and independent from the other state law issues raised in the Courts below. However, Appellants have not demonstrated the infringement of a fundamental constitutional right and consequently the standard of review is that of a rational relationship between the police power measure and its objective. Therefore, this entire litigation actually turns on the authority of a municipality under Texas law to exercise the police power, and the role of the courts in reviewing those legislative decisions. (See opinion of Texas Court of Appeals in Jurisdictional Statement at 34a-36a). Appellants, in essence, argue that *Houston and T.C. Ry. Co. v. City of Dallas,* 98 Tex. 396, 84 S.W. 648 (1905) established the analytical framework

for all Texas police power cases. (Jurisdictional Statement at 12.) Under Appellants' theory, the judiciary is invited to reassess every measure enacted pursuant to a municipality's police power and to determine if the benefits outweigh the potential harm alleged. In *Houston & T.C. Ry. Co.*, the City of Dallas sued the railroad in mandamus to force it to comply with a City ordinance requiring railroads to lower their tracks to grade level where such tracks crossed a public street. The railroad defended by alleging that the City ordinance was invalid because it violated the State constitutional provisions prohibiting the taking or damaging of private property for public use without compensation. (See Article I, § 17 of Texas Constitution.) The Supreme Court of Texas noted that the weight of authority supported the view that a railroad company can be required at its own expense to construct crossings at grade when public safety demanded the change. 84 S.W. at 652. That Court, however, was of the opinion that the railroad was entitled to a hearing on the benefit to the public compared to the burden placed on the railroad. Obviously, the benefit to the general public must be examined *vis-a-vis* the detriment to the individual property owner in order to measure whether or not a municipal police power regulation would reach the level of taking private property for public use without compensation. *City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex. 1978). Because there is no comparable issue of "taking" of Appellants' property, the analysis from *Houston & T.C. Ry. Co* is inapplicable. *Cf. Penn Central Trans. Co. v. City of New York*, 438 U.S. 104 (1978). The balancing technique that Appellants urge is merely an invitation for the courts to perform a legislative rather than a judicial function

in determining the wisdom and desirability of municipal public health measures and similar exercises of the police power. *City of Weslaco v. Melton*, 158 Tex. 61, 308 S.W.2d 18 (1957).

Appellants' arguments (Jurisdictional Statement at 10-11) regarding the trial court's alleged mistake in assessing their burden of proof clearly demonstrate their erroneous conception of the nature of this litigation. They seek to have the judiciary set aside a legislative decision of the City Council of the City of Houston. The evidence which they presented to the trial court and the arguments they make here suggest they believed that the trial court was empowered to decide whether or not the City of Houston should fluoridate its water supply. That was *not* the question before the trial court, nor is it a question this Honorable Court is to resolve. The decision to fluoridate was made by the duly elected officials who are charged with making legislative decisions for the City of Houston. The question presented at trial, and on appeal, is the same question of Texas law that is presented whenever a plaintiff challenges a municipality's exercise of its police power: whether or not the City Council acted in an arbitrary, capricious and unreasonable manner in making the decision it made. *Town of Ascarate v. Villalobos*, 148 Tex. 254, 223 S.W.2d 945, 950 (1949). This is the same test used under the Fourteenth Amendment in applying the rational relationship concept to challenges such as this. To go beyond a rational relationship review in the absence of a fundamental right, as Appellants seem to urge, would require this Honorable Court to explore the intricacies of Texas law governing the powers of its municipalities.

As a Home Rule City under Article XI, Section 5, of the Texas Constitution, the City of Houston has the power to provide for the health, safety and welfare of its residents. *See, generally,* TEX. REV. CIV. STAT. ANN. art. 1175; Article II, Section 2 of the City Charter of the City of Houston. Under its police power, the City has the authority and responsibility to determine when to act in the furtherance of the public health, safety and welfare. *City of Houston v. Johnny Franks Auto Parts Company,* 480 S.W.2d 774 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.). While the exercise of this judgment is subject to review by the Texas courts, those challenging the exercise have the extraordinary burden of proving that no controversial or issuable facts or conditions existed which would have authorized the City to exercise the discretion vested in it. *Lubbock Poster Company v. City of Lubbock,* 569 S.W.2d 935 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.), *cert. denied,* 444 U.S. 833 (1979). As the Supreme Court of Texas has recently observed, the burden on a party challenging the police power is indeed a heavy one. *City of Pharr v. Tippitt,* 616 S.W.2d 173, 176 (Tex. 1981). A legislative finding that a condition exists, the control of which is a proper exercise of the police power, must be accepted by the Texas courts as a basis for the validity of the objective of the action if there is any legally sufficient evidence to support such finding. *Smith v. Davis,* 426 S.W. 2d 827 (Tex. 1968); *City of Waxahachie v. Watkins,* 154 Tex. 206, 275 S.W.2d 477 (1955); *City of Houston v. Johnny Franks Auto Parts, supra.*

The decision of the Texas Court of Appeals correctly applied these principles to the City's fluoridation of its water supply, and the Supreme Court of Texas found no

reversible error. It is obvious that the City has a legitimate interest in the health of its residents. Article 1175 (28), TEX. REV. CIV. STAT. ANN., authorizes the City to provide for a health department and to establish rules and regulations for the protection of the public health. Article 4477-1, § 23(a), TEX. REV. CIV. STAT. ANN., disclaims any intention to reduce the City's police power over public health. Indeed, the courts in other jurisdictions have held with virtual unanimity that fluoridation of the public water supply is a valid exercise of the police power. *See Commonwealth of Pennsylvania v. City of Lebanon,* 393 A.2d 381 (Pa. 1978) and the cases collected therein at 385-386.

Appellants' burden under Texas law was to show that there is no rational relationship between the fluoridation of the City's surface water supply and the protection of public health. The fact that fluoridation is the subject of scientific controversy does not remove this matter from the ambit of the City's police power. If reasonable minds could differ as to whether the measure has a substantial relationship to the public health, no clear abuse is shown and it must stand as a valid exercise of the police power in Texas. *City of Waxahachie, supra,* 275 S.W.2d at 481. Appellants' argument seems to be that if, by the preponderance of evidence presented, they proved fluoride may be harmful, they should have prevailed. However, under the case law, it is not a court's function to second-guess a legislative decision on a matter of debate and controversy. Rather, the debate is one to be resolved by the legislative body. The fact that one side or the other presented more of its arguments in that debate to the trial court is immaterial to the question of law to be decided, *i.e.*, whether any "controversial or issuable facts

or conditions existed which would authorize the governing board of the municipality to exercise the discretion confided to it by a valid ordinance in determining a matter of purely governmental policy." *King v. Guerra,* 1 S.W.2d 373, 376 (Tex. Civ. App.—San Antonio 1927, writ ref'd).

In an analogous case, *Zucht v. King,* 260 U.S. 174 (1922), this Court affirmed a Texas decision which held a compulsory vaccination law to be valid against constitutional challenges based on the Fourteenth Amendment to the United States Constitution. This decision relied upon the holding of this Court in *Jacobson v. Commonwealth of Massachusetts,* 197 U.S. 22 (1905). *Jacobson* involved the constitutionality of the Massachusetts compulsory smallpox vaccination law as a valid exercise of the police power. Recognizing that there were divergent opinions in the medical profession as to the efficacy of compulsory vaccination as a means of preventing the spread of smallpox, the Court stated:

> "We must assume that when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. . . . It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in light of all the information it could obtain." (197 U.S. at 30.)

The compulsory smallpox vaccination cases are directly analogous to the case at bar. The City Council of the City of Houston was aware of the controversy concerning fluoridation and made its decision on the mode of pro-

tecting public health. (Findings of Fact, Nos. 8, 9, and 10.) The fact that dental caries is not a contagious disease as is smallpox does not destroy the analogy. Courts which have considered this restriction on *Jacobson* have usually rejected it on the basis that the protection of public health applies to the spread of both contagious and noncontagious diseases. *See Kaul v. City of Chehalis*, 45 Wash. 2d 616, 277 P.2d 352 (1954); *Chapman v. City of Shreveport*, 225 La. 859, 74 So.2d 142 (1954), *appeal dismissed*, 348 U.S. 892 (1954).

Appellants' arguments are but yet another invitation to this Honorable Court to make legislative decisions, an invitation it has repeatedly declined. Absent a measure which "trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, alienage," this Court has accorded "wide latitude" to the use of the police power, observing: "In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights not proceed along suspect lines. . . ." *City of New Orleans v. Dukes*, 427 U.S. 297, 303-304 (1976). Indeed, this Court has said: "We do not inquire whether this statute is wise or desirable, or 'whether it is based on assumptions scientifically substantiated.' " *James v. Strange*, 407 U.S. 128, 133 (1972). The issue of fluoridation presents a basic decision concerning the exercise of the municipality's police power. The decision should be made by the legislative body empowered to determine the advantages and disadvantages, not the courts. *Williamson v. Lee Optical*, 348 U.S. 483, 487-488 (1955). Appellants make the assertion that "[t]he nation needs the guidance of this Court to establish the constitutional standards for this

type of litigation." (Jurisdictional Statement at 16.) This Court's decisions just cited provide all the guidance that is necessary. Appellants would reject these constitutional standards and seek to read the anti-fluoridationists' position into the Fourteenth Amendment.

WHEREFORE, PREMISES CONSIDERED, Appellee prays that this appeal be dismissed for want of a substantial federal question and that the alternative request for a Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Motion to Dismiss have been forwarded to Attorneys for Appellants, John Remington Graham, 224 North 5th Street, Brainerd, Minnesota 56401 and Grant Kaiser, 800 Commerce Street, Houston, Texas 77002, by certified mail, return receipt requested, on this 9th day of July, 1984.

John E. Fisher

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